received against interest due to them on the mortgage. The balance of their collections, some $963/-, they held without accounting for it to the respondent.

The applicants state that they went into possession because a receiver had been appointed of respondent's lands and they wished to protect their interests; they only wished to secure payment of the interest on their mortgage and had no intention of repaying themselves the principal. There is ample evidence to support this and I accept it.

Mr. Conaghan for the respondent has contended that the entry by the applicants constituted a legal demand for repayment of the mortgage debt and has cited *Bovill v. Endle*[1] in support. The point decided in that case was that where a mortgagee has entered into possession of the mortgaged property he cannot refuse tender of his principal, interest and costs on the ground that he is entitled to six months' notice or six months' interest in lieu of notice. Kekewich, J. in giving judgment said :—

"It appears to me that, although the case is not actually covered by authority, yet it is by principle; and that a mortgagee cannot enter into possession for his own benefit and then say he is entitled to remain in the position of a mortgagee out of possession, and to ask for six months' notice or interest. The two positions are inconsistent. In my opinion by entering into possession the mortgagee says he requires payment, and payment in the way in which the law gives it to him."

The Court of Appeal impliedly approved of this view in *Ex Parte Wickens*[2].

The decision answered the question whether entry into possession was a taking of proceedings with a view to compelling payment of the debt and I think this is essentially the question which arises in these proceedings and it must be answered in the same way.

The property was mortgaged to secure repayment of principal and interest and these two items cannot be separated. Together they form the debt due under the mortgage and on entering into possession applicants took steps by which they could obtain payment of the whole amount due and in my view this constituted a notice to the respondent that applicants required payment of the whole debt and not merely of that part of it which represented interest.

The action of the applicants was in effect a demand for payment and as long as they continued in possession it was a continuing demand.

In my opinion the debt was not paid without demand and the applicants have not brought themselves within the exception to section 4(2)(b)(ii) of the Debtor and Creditor (Occupation Period) Ordinance. The claim is, therefore, dismissed with costs.

Claim dismissed.

MEYAPPA CHETTIAR v. TAN UN TING AND THREE ORS.

[Orig. Civ. Juris. (Jobling, J.) April 12, 1951]

[Penang — Originating Summons No. 274 of 1950]

Debtor and Creditor (Occupation Period) Ordinance, 1948, s. 11(1) and (5) — Repayment of Mortgage Money — No demand made — Revaluation of repayment money.

1st and 4th defendants mortgaged property to the plaintiff prior to the Japanese occupation of Malaya to secure two loans and the 2nd defendant joined in as surety. In January, 1945 the 3rd defendant repaid the loans and the plaintiff by direction of the 1st defendant transferred the mortgage to the 3rd defendant. Plaintiff claimed revaluation of the repayment and reinstatement or replacement of the security. A demand for repayment was alleged by defendants and denied by Plaintiff.

Held, that no demand for repayment was made and repayment must be revalued. Transfer of a mortgage is not a discharge within section 11(1) of the Debtor and Creditor (Occupation Period) Ordinance, 1948 and reinstatement of the security cannot be ordered. The only appropriate order is an order for replacement of the security under section 11(5).

ORIGINATING SUMMONS.

R. D. Hume for the plaintiff.

Chew Choon Poon for the first defendant.

Ong Huck Lim for the third defendant.

Lim Cheng Ean for the fourth defendant.

Second defendant did not appear.

The facts appear sufficiently from the judgment.

Cur. Adv. Vult.

Jobling, J. : — The plaintiff in this matter claims under the Debtor and Creditor (Occupation Period) Ordinance, 1948 for revaluation of the payment of a debt made during the Japanese occupation and reinstatement or replacement of the security formerly held by him in respect thereof.

It appears that the plaintiff lent the Estate and persons now represented by 1st and 4th defendants $30,000/- and $5,000/- on two mortgages of certain property and the 2nd defendant joined in and guaranteed repayment of the loans.

The loans were repaid by the 3rd defendant on 30th January, 1945 at the instance of the 1st defendant and on 5th February, 1945 the plaintiff transferred the mortgages to the 3rd defendant.

On 30th January, 1945 1st defendant entered into an agreement with 3rd defendant to sell to him his one-third interest in the mortgaged property for the sum of $50,000/-.

The plaintiff claims revaluation of the repayment of the loans on the ground that it was made without

demand by him, but the defendants allege that continuous demands were made by plaintiff.

The plaintiff has given evidence that no demand was made and the onus is clearly on the defendants to prove there was a demand.

In view of the conflicting assertions by the parties it is fortunate that there are certain admitted facts that indicate where the truth lies. In the first place it is admitted that three months' additional interest was paid to the plaintiff at the time of repayment of the loans. According to 1st defendant he attended at the lawyer's (Mr. Ong Huck Lim's) office on 24th January, 1945 and two cheques were handed over by 3rd defendant to Mr. Ong Huck Lim in payment of the amount due. He does not say whether this included the three months additional interest but according to the plaintiff it did. 1st defendant states that there was no discussion then about the payment of additional interest in lieu of notice but 3rd defendant told him later that plaintiff's agent had refused to sign the transfer until it had been paid and he agrees that it was paid. This took place in the presence of Mr. Ong Huck Lim and I cannot believe that any lawyer would have permitted his client to make such a payment unless the loans were being voluntarily repaid without notice. There is no evidence that Mr. Ong Huck Lim made any protest.

Secondly there is the admitted fact that at the time that 1st defendant says the plaintiff was pressing him for repayment of these loans the plaintiff lent further sums of about $2,000/- to 1st defendant. It is quite incredible that plaintiff should press for repayment of one loan and at the same time make further advances to 1st defendant.

Thirdly there is evidence that the property mortgaged as security for the loans was very valuable and there was no risk of the loans proving irrecoverable. And lastly there is the fact sufficiently indicated by the schedule to the Debtor and Creditor (Occupation Period) Ordinance, 1948 that occupation currency was in January, 1945 very inflated and it was greatly to the advantage of the defendants to pay off the loans in that currency then.

The defendants have put forward no evidence that there was a demand other than the assertion of the 1st defendant and that is not sufficient in my opinion to discharge the onus upon them. On the contrary the facts I have mentioned above make it clear that all the probabilities are against any demand having been made and I find as a fact that the repayment was not demanded.

As regards plaintiff's application to have the security reinstated or replaced section 11(1) of the Debtor and Creditor (Occupation Period) Ordinance, 1948 provides for the reinstatement of the security only where the original charge has been discharged. In this case the charge has not been discharged but transferred to another person and this provision of the law is inapplicable.

But sub-section (5) of the same section gives the Court power to order replacement of the security with other security where the debtor makes default in complying with a notice given by the creditor under sub-section (3) of section 11. It is in evidence that the creditor gave the specified notice and the debtor has not complied with it. The plaintiff now asks for replacement of the security by a third charge on the same property. He states he will be satisfied with that as the property is a valuable one and the security should be adequate.

Mr. Ong Huck Lim for 3rd defendant has objected to the whole of the property in question being made subject to the third charge. He contended that the 3rd defendant was a *bona fide* purchaser for value of the 1st defendant's one-third share in the property and comes within the exception set out in proviso (b) to section 11(1) as follows:—

"Provided that—

(a) .....

(b) where the charged property is immovable property and such property has, after its discharge or purported discharge as aforesaid, been transferred or charged to a **bona fide** purchaser or chargee for value without the intervention in the transaction of the custodian or a liquidation officer;

the discharge to the chargor by the chargee or his agent shall not be void as aforesaid, but the title of such **bona fide** purchaser or chargee for value, or any person claiming through or under him shall prevail against the title of the original chargee."

The 3rd defendant relies on an Indenture dated 30th January, 1945 by which the 1st defendant agreed to sell his one-third share in the property to the 3rd defendant, subject to the fulfilment of certain conditions. But this is quite clearly only an agreement for sale; it is not a legal transfer of the property within the meaning of the above quoted proviso and there is therefore no legal objection to a third charge over the whole property.

Judgment will therefore be for the plaintiff for the revaulation of the two debts at a total of $33,250/- and for replacement of the former security by a third charge on the same property in favour of the plaintiff for the sum of $33,250/- and interest; the charge to

be executed by the defendants in the same capacities as they executed the two original charges.

1st, 2nd and 4th defendants to pay the costs of the proceedings.

Judgment for the plaintiff.

KOK HO TEIK & ANOTHER v. YEAP LEAN SENG & 5 OTHERS.

[Orig. Civ. Juris. (Jobling, J.) January 18, 1951]
[Penang — Civil Suit No. 267 of 1949]

Japanese Judgments and Civil Proceedings Ordinance, 1946 s. 7 — Dealings in Land (Occupation Period) Ordinance, 1949 s. 6 — Whether section 7 of the Japanese Judgments and Civil Proceedings Ordinance is impliedly repealed by the Dealings in Land (Occupation Period) Ordinance — Whether Japanese Judgment which has been registered can be pleaded as a defence.

In this case the plaintiffs, the trustees of the Will of Cheong Keng Quee (deceased) claimed a declaration that they are entitled to certain land in Penang. It appeared that in June and August 1943, Orders of Court were made by the Japanese Court ordering **inter alia** that the land be sold to one Yeap Chor Ee and that by an Indenture dated the 25th August 1943, the land was conveyed to the first four defendants by direction of Yeap Chor Ee. The defendants claimed that the sale to Yeap Chor Ee was duly authorised by the Court and the Conveyance dated 25th August 1943, being properly executed gave the first four defendants an indefeasible title to the land. No application for the substitution of the Japanese Orders had been made.

For the Plaintiffs it was contended that the Japanese Order of Court could not be pleaded by the Defendants in view of section 7 of the Japanese Judgments and Civil Proceedings Ordinance 1946.

For the Defendants it was contended that section 6(2) of the Dealings in Land (Occupation Period) Ordinance 1949 altered the position by providing that where a Japanese decree was registered it was for the same validity force and effect as a decree of a competent Court.

Held, (1) that Section 7 of the Japanese Judgments and Civil Proceedings Ordinance 1946, has not been impliedly repealed by Section 6 of the Dealings in Land (Occupation Period) Ordinance 1949; (2) that as no Order of a competent Court had been substituted for the Japanese orders, they could not be pleaded in any Court and therefore the conveyance was not binding on the estate.

Case referred to :—

(1) *In re Lewis and Berry* (1936) 1 Ch. 274.

ACTION.

E. D. Shearn (*F. G. Pooley* and *Lim Khye Seng* with him) for the plaintiffs.

C. D. D. Hogan (*R .D. Hume* with him) for the defendants.

Jobling, J. : — The plaintiffs' claim in this Suit is for a declaration that they are entitled as trustees of the Will of Cheang Keng Quee deceased to certain land in Penang known as Lot 8[I] Town Subdivision 23 and for a further declaration that a conveyance of this land to the first four defendants made on 25th August, 1943 is not binding on the Estate of which they are trustees.

The facts in the matter are not in dispute.

The deceased Cheang Keng Quee died on 13th December, 1901 possessed of the land in question and the position immediately prior to the Japanese occupation of Malaya was as follows : — The trustees of the Estate were the two plaintiffs together with Cheang Kok Sang and Cheang Chee Choong and an Order had been made for the administration of the trusts of the Will and for the appointment of Messrs. E. V. C. Thomson and V. C. Nolan as Receivers and Managers. The land in question had been mortgaged together with other land to the Hongkong & Shanghai Banking Corporation for $183,000/-. Further, two Orders of Court had been obtained, authorising the sale of the land and approving its sale to one Lim Lean Teng for $450,000/-. This sale did not, however, take place because of the outbreak of war with Japan.

During the Japanese occupation of Malaya the Receivers and Managers were interned and Cheang Chee Choong was the only trustee present in Penang; Cheang Kok Sang and the second plaintiff were in Hongkong and the first plaintiff was in Ipoh.

On 1st July, 1942, the Japanese authorities published a Decree purporting to vest in the Public Trustee all estates administered or managed by firms, companies and individuals deemed to be enemies.

On 5th May, 1943 Cheang Chee Choong, the only trustee present in Penang, applied to the Court by way of Originating Summons No. 44 for directions regarding the land in question and Orders of Court were made on 22nd June, 1943, 5th August, 1943 and 10th August, 1943 declaring the original Order for sale of the property to be of no effect, ordering that the property be sold by private tender, declaring Yeap Chor Ee to be the purchaser at the price of $935,000/- and authorising the fifth defendant as Officer-in-Charge of the Public Trustee's Office, Penang to execute the conveyance in favour of the purchaser on behalf of the absent trustees Cheang Kok Sang, Kok Ho Teik and Cheang Kok On.

On 25th August, 1943 an Indenture conveying the property to the first, second, third and fourth defendants by direction of Yeap Chor Ee was executed by the trustee Cheang Chee Choong and by the fifth defendant on behalf of the other three trustees.

On 26th August, 1943 the Orders of Court made by the Japanese Court dated 5th August, 1943 and 10th August, 1943 authorising the sale of the property were registered in the Registry of Deeds.